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No. 96-426

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

PAOLO LODUCA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER

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13 pp

TABLE OF AUTHORITIES

CASES Page

Bender v. *Williamsport Area School Dist.*, 475 U.S. 534 (1986) 1
Cary v. *Curtis*, 44 U.S. (3 How.) 236 (1845) 2
Commodities Futures Trading Comm'n v. *Schor*, 478 U.S. 833 (1986) 9
Dacey v. *Dorsey*, 568 F.2d 275 (2d Cir. 1978) 7
Ex Parte Yerger, 75 U.S. (8 Wall.) 85 (1868) 2
Fernandez v. *Phillips*, 268 U.S. 311 (1925) 9
Finley v. *United States*, 490 U.S. 545 (1989) 2
Gomez v. *United States*, 490 U.S. 858 (1989) 8
Gordon v. *United States*, 117 U.S. 697 (1865) 5, 6
Grin v. *Shine*, 187 U.S. 181 (1902) 8
Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792) 5
Hooker v. *Klein*, 573 F.2d 1360 (9th Cir. 1987) 4
In re Kaine, 55 U.S. (14 How.) 103 (1853) 2
In re Mackin, 668 F.2d 122 (2d Cir. 1981) 2
In re Massieu, No. 95-6012G-01 (D.N.J. 1995) 4
In re Massieu, No. 95-6082G-01 (D.N.J. 1995) 4
In re Metzger, 46 U.S. (5 How.) 176 (1847) 2
Mistretta v. *United States*, 488 U.S. 361 (1989) 3, 5
Ng Fung Ho v. *White*, 259 U.S. 276 (1882) 9
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 9
Peretz v. *United States*, 501 U.S. 923 (1991) 8, 9
Plaut v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447 (1995) 3, 6, 7
Renne v. *Geary*, 501 U.S. 312 (1991) 1
Seminole Tribe of Florida v. *Florida*, 116 S. Ct. 1114 (1996) 3
Sheldon v. *Sill*, 49 U.S. (8 How.) 441 (1850) 2
United States v. *Abreu*, 747 F. Supp. 493 (N.D. Ind. 1990) 6
United States v. *Cowan*, 524 F.2d 504 (5th Cir. 1975) 6, 7
United States v. *Cox*, 342 F.2d 167 (5th Cir. 1965) 6, 7
United States v. *Doherty*, 786 F.2d 491 (2d Cir. 1986) 4
United States v. *Ferreira*, 54 U.S. (13 How.) (1852) 3

TABLE OF AUTHORITIES—Continued

Page

United States v. *Jones*, 119 U.S. 477 (1886) 6
United States v. *Raddatz*, 447 U.S. 667 (1980) 9
Williams v. *United States*, 289 U.S. 553 (1933) 6
Young v. *United States*, 315 U.S. 257 (1942) 6

CONSTITUTIONAL PROVISIONS

Article I ..... *passim*
Article III ..... *passim*

STATUTES AND RULES

28 U.S.C. § 1331 10
Act of March 23, 1792, 1 Stat. 243 5
Fed. R. Crim. P. 5.1 7
Fed. R. Crim. P. 48 ..... 6, 7

MISCELLANEOUS

H.R. Rep. No. 94-1609 (1976) 8
S. Rep. No. 90-371 (1967) 8
S. Rep. No. 94-625 (1976) 8
S. Rep. No. 96-74 (1979) 8
Bartell, *Contempt of the Bankruptcy Court—A New Look*, 1996 U. Ill. L. Rev. 1 8
Easterbrook, *Success and the Judicial Power*, 65 Ind. L.J. 277 (1990) 3
Hackworth, *Digest of International Law* (1942) 4

REPLY BRIEF FOR PETITIONER

1. The Opposition mirrors the confusion and inconsistency in the lower courts over the constitutional source of jurisdiction in extradition cases, when it claims that "it is unnecessary to resolve" whether extradition cases are conducted pursuant to Article I or Article III. Br. Opp. 13. Silence on that central question certainly forestalls the Opposition from having to endorse the Second Circuit's extraordinary answer, that Article III judges can adjudicate a case or controversy pursuant to Article I. That strategic silence, however, betrays a basic misunderstanding of our federalism: as courts of limited jurisdiction, federal courts must "presume that [they] lack jurisdiction." *Renne* v. *Geary*, 501 U.S. 312, 315 (1991). For that reason, federal courts have an unrelenting duty to inquire into "the first and fundamental question" of jurisdiction at every stage of the proceeding. *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 546-47 (1986) (quotation omitted). Federal courts cannot discharge that duty by simply asserting, as the Opposition suggests, that they have jurisdiction under either Article I or Article III, whichever of those mutually exclusive bases a lower court might prefer.

2. The Opposition argues that the extradition statute, which expressly "vested . . . power, jurisdiction, and authority," A. 69a, nonetheless "does not purport to act as a jurisdictional grant" and "had nothing to do with a desire to grant jurisdiction." Br. Opp. 14, 15. But if Congress did not intend to do what it said it was doing—vest jurisdiction—what purpose did the extradition statute serve? The Opposition, quoting the statute's own title, says the statute was meant to "giv[e] Effect" to extradition treaties, Br. Opp. 15, but the Opposition never says why that was necessary. The answer, of course, is plain: a treaty alone cannot vest jurisdiction in federal courts; a specific statutory grant of jurisdiction is required.

The necessity of a statutory grant is apparent from *Metzger* and *Kaine*. Before the extradition statute was enacted, this Court did not have jurisdiction to review an extradition case. *In re Metzger*, 46 U.S. (5 How.) 176 (1847). After the statute was enacted, it did. *In re Kaine*, 55 U.S. (14 How.) 103 (1853); *see Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 100 (1868) ("in Kaine's case, all the judges, except one, asserted, directly or indirectly, the jurisdiction of this court to give relief"); Pet. Cert. 8-9.[1] Only a statute could fill the jurisdictional gap identified in *Metzger*, because only Congress has the power to set the subject-matter jurisdiction of inferior federal courts. As this Court held three years before the extradition statute was enacted,

> "the judicial power of the United States . . . [depends] entirely upon the action of Congress, who possess the sole power of creating tribunals (inferior to the Supreme Court) for the exercise of the judicial power, and of investing them with jurisdiction either limited, concurrent or exclusive."

Cary v. *Curtis*, 44 U.S. (3 How.) 236, 245 (1845). This "rudimentary law" of federal courts, *Finley* v. *United States*, 490 U.S. 545, 548 (1989), was so well-entrenched at the time the extradition statute was enacted that this Court considered it "tedious and unnecessary" to enumerate all the cases that either "directly" or "tacitly" relied on it. *Sheldon* v. *Sill*, 49 U.S. (8 How.) 441, 448 (1850).

3. The Opposition suggests, without directly saying, that Article III judges may constitutionally adjudicate a case or controversy pursuant to Article I. Br. Opp. 17. If that startling claim were correct, Article III would be meaningless because its strictures could be evaded by the

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[1] The Opposition cites dicta in *In re Mackin*, 668 F.2d 122 (2d Cir. 1981), a decision that makes no mention of the crucial statutory language vesting "power, jurisdiction and authority" and that oddly suggests that the *Kaine* majority, which held that this Court had jurisdiction, was somehow in agreement with Justice Curtis' dissent on that point arguing that it did not. *Id.* at 126 n.8.

simple artifice of granting adjudicatory power to Article III judges in their individual capacity and not their official one. The Constitution bars such easy evasions: "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe of Florida* v. *Florida,* 116 S. Ct. 1114, 1132 (1996).

Rather than engage this constitutional principle, the Opposition relies entirely on an idiosyncratic reading of *Mistretta* v. *United States,* 488 U.S. 361 (1989)—a reading which implies that every adjudication, including those beyond the bounds of Article III, may be constitutionally assigned to Article III judges in their individual capacity. Br. Opp. 17-18. This reading of *Mistretta,* if it ever found life beyond the pages of the opposition, would surely explode the limitations of Article III. The only case cited in support of it is *United States* v. *Ferreira,* 54 U.S. (13 How.) 40 (1852), which involved the "executive function," *Mistretta,* 488 U.S. at 403, of adjusting treaty-based compensation claims. That function was "entirely alien to the legitimate functions of a judge or court" and was performed in a proceeding that was "altogether ex parte" with "no suit . . . no parties . . . no process." *Ferreira,* 54 U.S. at 51-52. *Ferreira* was an adjudication only in the broadest sense that it involved the exercise of "judgment and discretion." *Id.* at 49. But every "application of law to facts" is such an exercise, including the "[f]aithful execution" of the laws. Easterbrook, *Success and the Judicial Power,* 65 Ind. L. J. 277, 280 (1990). This Court has never approved of an adjudication by an Article III judge pursuant to any provision other than Article III, and *Ferreira* is no exception.

4. Article III "gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy—with an understanding, in short, that a judgment *conclusively* resolves the case because a 'judicial Power' is one to render *dispositive* judgments." *Plaut* v. *Spendthrift Farm, Inc.,* 115 S. Ct. 1147, 1453 (1995) (em-

phasis added; quotations omitted). A judgment in an extradition case, however, has no res judicata effect, no matter how it is decided.

If the judge rules in favor of the requested person, as the Opposition concedes, the requesting state may file a new complaint that must be heard *de novo*, even if based on exactly the same evidence.[2] Br. Opp. 6. And if the judge rules for the requesting state, as the Opposition also concedes, the Secretary of State may still exercise the "full discretion," Br. Opp. 6, 21, given him by the extradition statute and refuse to extradite the requested person. "[T]he Secretary of State, acting for the President, could reach a conclusion contrary to that of the Supreme Court and act upon his conclusion." 4 Hackworth, *Digest of International Law*, § 338 at 189 (1942) (quoting Mem. of Asst. Legal Adviser, Jan. 4, 1934). Every branch of government agrees that the Secretary possesses such executive discretion to review and revise decisions in extradition cases. *See* Pet. Cert. 15.

5. Judgments ordering extradition are by statute merely "certif[ied]" to the Secretary of State, who is not bound by such judgments and who "may"—or may not—accept them. A. 69a. The grave constitutional problems posed by this executive revision convinced the Second Circuit to adopt what it thought was a constitutional, alternative construction of the extradition statute, holding that Article III judges can adjudicate a case or contro-

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[2] *See, e.g., United States* v. *Doherty*, 786 F.2d 491, 501 (2d Cir. 1986); *Hooker* v. *Klein*, 573 F.2d 1360, 1364 (9th Cir. 1978). The recent case of Ruiz Massieu, a former high-ranking official of the Mexican government, exemplifies the dead letter quality of a ruling in a requested person's favor. He won one extradition proceeding. *See In re Massieu*, No. 95-6012G-01 (D.N.J.) (Order of Dismissal, filed June 22, 1995). He was kept in prison while a second extradition request was prepared. He won again. *See In re Massieu*, No. 95-6082G-01 (D.N.J.) (Order of Dismissal, filed Sept. 25, 1995). He was kept in prison again while a third request was prepared. He won yet again. The government then sought to deport, not extradite, him.

versy pursuant to Article I. "[I]t is *dispositive*," said the Second Circuit in reaching its Article I construction of the statute, "that, since the decisions of extradition officers are subject to revision by the Secretary of State, those officers do not exercise judicial power within the meaning of Article III." A. 12a (emphasis added).

As the Second Circuit recognized, if construed as a grant of Article III adjudicatory power, the extradition statute is indistinguishable from those struck down in two of the most famous cases prohibiting advisory opinions. In *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), federal judges were authorized, as here, to "certify" a mixed question of law and fact—whether certain widows and orphans of Revolutionary War veterans "should be put on the pension list"—to the Secretary of War, who had full discretion to reject those certifications. Act of March 23, 1792, ch. 11, 1 Stat. 243, 244. Despite the Act's benevolent purposes, Chief Justice Jay and Justice Cushing, sitting as Circuit Justices, held the statute unconstitutional:

> it subjects the decisions of these courts, made pursuant to those duties, first to the consideration and suspension of the Secretary at War, and then to the revision of the Legislature; whereas by the Constitution, neither the Secretary at War, nor any other Executive officer, nor even the Legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court.

2 U.S. at 410 (emphasis in original).[3]

This Court similarly struck down the original jurisdictional statute of the Court of Claims. *Gordon* v. *United States*, 117 U.S. 697 (1865). The statute provided that federal courts would "certify their opinion [of the validity

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[3] The opinions reported in *Hayburn's Case* are binding precedent. *See Mistretta*, 488 U.S. at 402-03.

of claims] to the Secretary of the Treasury," who had the power to prevent payment unless and until "an appropriation therefor shall be estimated for" by him. *Gordon*, 117 U.S. at 698. In an unpublished decision, this Court held that the Executive power "to revise all the decisions of that court . . . denies to it the judicial power." *United States* v. *Jones*, 119 U.S. 477, 478 (1886).[4]

6. Under Article III, the Judiciary must have "the last word . . . with regard to a particular case or controversy." *Plaut*, 115 S. Ct. at 1457. After a hunt for any example, apart from extradition cases, in which the Judiciary does not in fact have the last word on the cases before it, the Opposition claims to have identified only one—an asserted executive "discretion to discontinue a prosecution." Br. Opp. 11 n.4, 21-22. That assertion is mystifying. Rule 48 of the Federal Rules of Criminal Procedure expressly says that the government "*may by leave of court* file a dismissal of an indictment, information or complaint." (emphasis added). It is hard to see how the government has the "last word," *Plaut*, 115 S. Ct. at 1457, in the dismissal of a prosecution when every such dismissal requires "leave of court."[5]

The cases cited by the Opposition address the *initiation* of a prosecution, not the termination of one after it has reached a federal court. *See United States* v. *Cox*, 342

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[4] *Gordon* is binding precedent. *See Williams* v. *United States*, 289 U.S. 553, 564 (1933).

[5] The history of Rule 48 further undermines the Opposition's claim. This Court refused to approve a draft of Rule 48 that gave the government "unqualified authority to *nolle prosse* a case without consent of the court." *United States* v. *Cowan*, 524 F.2d 504, 510 (5th Cir. 1975). Citing *Young* v. *United States*, 315 U.S. 257-259 (1942), and the concern expressed there regarding the proper "performance of the judicial function" in the dismissal of criminal cases, this Court re-wrote the draft Rule to require "leave of court" for all dismissals. *Cowan*, 524 F.2d at 512-13; *see United States* v. *Abreu*, 747 F. Supp. 493, 502 (N.D.Ind. 1990) (court is not a "rubber stamp" and determining "sound basis" for dismissal of indictment is "more than a rare ministerial administrative act; a judicial determination is sought").

F.2d 167 (5th Cir. 1965); *Dacey* v. *Dorsey*, 568 F.2d 275 (2d Cir. 1978). As the Fifth Circuit explained, "ours is not a *Cox* case. *Cox* involved a challenge to the power of the court to direct the *commencement* of a prosecution under Rule 7(c). We are concerned with the power of the court to supervise the *termination* of a prosecution under Rule 48(a)." *United States* v. *Cowan*, 524 F.2d 504, 509 (5th Cir. 1975) (emphasis added). The Opposition cites no case in which the government has dismissed an on-going prosecution without first seeking leave of court under Rule 48.

7. The Opposition suggests that an extradition hearing is the same as a preliminary hearing under Fed. R. Crim. P. 5.1. *See* Br. Opp. 11, 21. The Opposition overlooks a crucial difference: a preliminary ruling is "preliminary" precisely because—unlike an extradition judgment—it is always subject to additional review by the court before a final judgment is issued. And the ruling is subject to further review on direct appeal from that final decision.

The strictures of Article III do not apply to such preliminary rulings because, within the Judiciary's own hierarchy, "the decision of an inferior court is not (unless the time for appeal has expired) the final word of the department as a whole." *Plaut*, 115 S. Ct. at 1457. The limitations of Article III are limitations on the Judiciary as a co-equal branch of government; and they require that the ultimate judgment to be rendered remain within the control of the Judicial Branch. Article III, § 1 vests "the judicial Power" exclusively in the Judiciary—which is "not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one supreme Court.'" *Plaut*, 115 S. Ct. at 1457 (emphasis original). It is thus only when "a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy," *id.*, that the strictures of Article III apply. That "last word," *id.*, must be final and conclusive between the parties—as it plainly is in criminal cases, and just as plainly is not in extradition cases.

8. The Opposition concedes the obvious—that "federal magistrate judges act as 'adjuncts' to Article III courts" in extradition proceedings. Br. Opp. 16 n.9. *See Grin* v. *Shine*, 187 U.S. 181, 187 (1902); Pet. Cert. 18. But the Opposition then suggests that petitioner's Article III challenges to the extradition statute are somehow "irrelevant to the constitutionality of his own extradition," simply because the district court's Local Rules automatically assigned petitioner's extradition case to a magistrate and not to an Article III judge. Br. Opp. 16. The Opposition does not press this curious logic, and it unravels under the barest scrutiny.

As adjuncts, magistrates are "assistants" to the district court, *Peretz* v. *United States*, 501 U.S. 923, 939 (1991), meant to "handle subsidiary matters." *Gomez* v. *United States*, 490 U.S. 858, 872 (1989).[6] An assistant, whose power is derivative of the district court, can exercise no power other than that possessed by the district court. Exercising, even if derivatively, the power of an Article III court, magistrates in extradition cases are bound by the strictures of Article III: like bankruptcy judges, they have no "existence independent of the Article III district court and cannot have powers, statutory or inherent, that are not derivative of the court of which [they are] a unit." Bartell, *Contempt of the Bankruptcy Court—A New Look*, 1996 U. Ill. L. Rev. 1, 28.

9. The Opposition's assertion that the "judiciary retains complete control over the participation of magistrates in the extradition process," Br. Opp. 24, is fantasy. The fact, of course, is that the magistrate in an extradition proceeding *is not supervised at all.* The magistrate in petitioner's case acted entirely on his own. He heard all

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[6] *See* S. Rep. No. 96-74, p. 3 (1979) (1979 amendments to Federal Magistrates Act); H.R. Rep. No. 94-1609, pp. 6-7 (1976) (same); S. Rep. 94-625, p. 6 (1976) (same); S. Rep. No. 90-371, p. 9 (1967) (same).

the evidence; evaluated all the witnesses; and made all the rulings. He decided the case and issued his judgment without any judicial participation. His judgment was not subject to review by direct appeal; and the habeas review actually afforded applied an "any evidence" standard of review.[7] That situation is the farthest cry imaginable from that approved in *United States* v. *Raddatz*, in which the magistrate was tightly confined to making recommendations as to certain non-dispositive motions, and then only when "the entire process takes place under the district court's total control and jurisdiction" and only "so long as the ultimate decision is made by the district court." 447 U.S. 683, 681 (1980).

This Court has regularly emphasized that the exercise of judicial power by magistrates raises core constitutional concerns. *Id.* at 681; *Peretz*, 501 U.S. at 929-30, 937-39; *Commodities Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 850-51 (1986); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 58-59 (1982) (plurality) ("The inexorable command of [Article III] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III"). Article III and Due Process are violated where, as in extradition cases, magistrates act as substitutes for federal courts, and not as adjuncts to those courts and under their genuine control and supervision.[8]

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[7] *See Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925). The "any evidence" standard is even less searching than the clear error review rejected as constitutionally insufficient in *Commodities Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 852-53 (1986). Most decisions by magistrates are subject to *de novo* review. *See United States* v. *Raddatz*, 447 U.S. 667, 681 (1980).

[8] The Opposition wrongly claims that petitioner did not raise a due process claim before the Second Circuit. Br. Opp. 26 n.12. He did, and cited *Ng Fung Ho* v. *White*, 259 U.S. 276 (1922), to make the point. *See* C.A. Appellant Supp. Br. 40-41.

10. Declaring the extradition statute unconstitutional will not disrupt treaty obligations or require remedial legislation: extradition proceedings are civil actions that could proceed under 28 U.S.C. § 1331 in the district court. A general jurisdictional grant surely applies where a specific jurisdictional grant such as the extradition statute has been declared unconstitutional. The difference, of course, is that extradition cases would then be decided in accordance with Article III, and not in defiance of it.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted.

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